



JUL 14 2010

MEMORANDUM FOR LINDA NEILSON
DEPUTY DIRECTOR
DEFENSE PROCUREMENT

THRU: EDWARD LOEB
DIRECTOR
ACQUISITION POLICY DIVISION

FROM: HADA FLOWERS *Hb*
SUPERVISOR
REGULATORY SECRETARIAT

SUBJECT: FAR Case 2009-004, Enhancing Contract Transparency

Attached are comments received on the subject FAR case published at 75 FR 26916, May 13, 2010. The comment closing date was July 12, 2010.

<u>Response Number</u>	<u>Date Received</u>	<u>Commenter</u>	<u>Organization</u>
2009-004-1	05/13/10	Greg Hunt	USTRANSCOM Acquisition
2009-004-2	05/14/10	Kari Schoerner	RDECOM Contracting Center
2009-004-3	05/13/10	Julie Basile	SEC, Office of Acquisition
2009-004-4	05/13/10	Michael Johnson	
2009-004-5	06/02/10	Michael Carmody	
2009-004-6	06/04/10	Brian May	US Army
2009-004-7	07/07/10	George C. Coker	US Army 413 th CSB

<u>Response Number</u>	<u>Date Received</u>	<u>Commenter</u>	<u>Organization</u>
2009-004-8	07/12/10	Sylvia Fern Linke	U.S. Army Contracting Command
2009-004-9	07/12/10	Marco Giamberardino	The Assoc. General Contractors of America
2009-004-10	07/12/10	Cheryl Howe	HHS
2009-004-11	07/12/10	Mitchell Thomas Vakerics	Coalition for Government Procurement
2009-004-12	07/12/10	Scott H. Amey	POGO
2009-004-13	07/12/10	A.R. "Trey" Hodgkins, III	TechAmerica
2009-004-14	07/12/10	David A. Churchill	Jenner & Block

Attachments

PUBLIC SUBMISSION

As of: July 13, 2010
Received: May 13, 2010
Status: Pending Post
Tracking No. 80aece57
Comments Due: July 12, 2010
Submission Type: Web

Docket: FAR-2010-0089

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Comment On: FAR-2010-0089-0001

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Document: FAR-2010-0089-DRAFT-0001

Comment on FR Doc # 2010-11381

Submitter Information

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Organization: USTRANSCOM ACQUISITION

General Comment

The council needs to consider the difficulty involved in requiring the public posting of decentralized transportation task orders that are done by individual DOD transportation officers throughout the DOD. Typically, the commercial Airway Bill, Commercial Bill of Lading (CBL), or Government Bill of Lading (GBL) constitutes the task order against a base transportation contract, so I'm not sure it is practical to require decentralized transportation orders done via Airway Bills, CBLs, or GBLs to be required to be posted on-line. Additionally, these documents would contain contractor's pricing information.

PUBLIC SUBMISSION

As of: July 13, 2010
Received: May 14, 2010
Status: Pending_Post
Tracking No. 80aeddbe
Comments Due: July 12, 2010
Submission Type: Web

Docket: FAR-2010-0089

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Comment On: FAR-2010-0089-0001

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Document: FAR-2010-0089-DRAFT-0002

Comment on FR Doc # 2010-11381

Submitter Information

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Government Agency Type: Federal

Government Agency: USA

General Comment

FAR 5.2 requires a posting of the RFP; FAR 5.3 requires a posting of the award. The details can change slightly through negotiations, but the main requirements of any contract (from the RFP), plus the awardee and contract value (from posting the award) are already public knowledge. For delivery/task orders, this isn't the case, but why not require that same reporting? The RFP, the awardee and the value?

PUBLIC SUBMISSION

As of: July 13, 2010
Received: May 13, 2010
Status: Pending_Post
Tracking No. 80aecc7a
Comments Due: July 12, 2010
Submission Type: Web

Docket: FAR-2010-0089

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Comment On: FAR-2010-0089-0001

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Document: FAR-2010-0089-DRAFT-0003

Comment on FR Doc # 2010-11381

Submitter Information

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Government Agency: SEC

General Comment

Concerning the question as to whether or not an agency can post a complete contract award online, the answer is yes. They already have all the permissions needed to do so. The FAR does not need to be changed to provide this level of transparency. It would have to be changed to make the posting mandatory.

If the agency has an electronic copy of a contract they can post them on a website recognizing the Freedom of Information Act (FOIA) process that must be considered before this occurs. The FOIA process addresses what information should and should not be provided to a requestor. This provides a process to review and remove any information that might be proprietary, classified, sensitive, or personal in nature.

There are several agencies that post their contract award documents in their FOIA Reading Rooms if the contract has been requested at least three times and a redacted copy is available in an electronic format.

In addition, one agency posting contracts online immediately because they make purchases using

published catalogs and the prices are exactly the same.

With no further guidance necessary, a contracting officer that desires to post contracts online could establish the Request For Proposals (RFP) in such a way to ask the offerors in their proposals to segregate anything that the vendor feels is proprietary keeping it in its own section or attachment of the RFP. This would enable the majority of the contract to be posted online immediately. If a FOIA is requested for the remainder of the contract, review and redaction would be made simpler by looking over just the section or attachment not posted initially.

For your information, a study was conducted on this topic in 2004. The 15 page paper is available at the following: www.acquisition.gov/CADOWhitePaper12_20_04V1.doc.

PUBLIC SUBMISSION

As of: July 13, 2010
Received: May 13, 2010
Status: Pending_Post
Tracking No. 80aec4f1
Comments Due: July 12, 2010
Submission Type: Web

Docket: FAR-2010-0089

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Comment On: FAR-2010-0089-0001

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Document: FAR-2010-0089-DRAFT-0004

Comment on FR Doc # 2010-11381

Submitter Information

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General Comment

For the vast majority of contracts awarded, the contents of the contract are already made public during the solicitation phase. Unless the contract is going through a negotiation method of award, the resultant contract award should mirror the solicitation documents that were issued including any amendments. By posting the award information that is required (Contract number, awardee information, total amount of award) the releasable contract data has been issued.

In regards to solicitations and awards that aren't commonly posted such as Task/Delivery Orders, one of the easiest methods that can be employed is a process I started when I worked for the Department of Transportation, Federal Highway Administration, Western Federal Lands Highway Division. The IDIQ information is posted to the gency web site and all task orders awarded under those contracts are also posted. You can see it by going to their web site at <http://www.wfl.fhwa.dot.gov/contracting/construction/idiq/>

This works for both Single Award IDIQ's and Multiple Award IDIQ's.

PUBLIC SUBMISSION

As of: July 13, 2010
Received: June 02, 2010
Status: Pending_Post
Tracking No. 80af9c09
Comments Due: July 12, 2010
Submission Type: Unknown

Docket: FAR-2010-0089

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Comment On: FAR-2010-0089-0001

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Document: FAR-2010-0089-DRAFT-0005

Comment on FR Doc # 2010-11381

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General Comment

My concern with this proposed rulemaking is that there is no identification of what contracts will be exempt from this requirement. There are certain contracts that should be precluded from general public viewing. Specifically, will contracts that are awarded citing 10 U.S.C. 2304(c)(6) be exempt from this requirement? Posting contracts citing that authority or describing proprietary capabilities of a weapon system could have a compromising effect on national security. The lack of specificity in this rule makes it difficult to support one way or the other.

PUBLIC SUBMISSION

As of: July 13, 2010
Received: June 04, 2010
Status: Pending_Post
Tracking No. 80afb827
Comments Due: July 12, 2010
Submission Type: Web

Docket: FAR-2010-0089

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Comment On: FAR-2010-0089-0001

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Document: FAR-2010-0089-DRAFT-0006

Comment on FR Doc # 2010-11381

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Government Agency: USA

General Comment

I think non-proprietary versions of all contracts should be posted on the web for at least one year after award, then kept in a searchable database to download in the future. The Component Contracting Offices should be able to post a version of the contract (without unit prices, labor rates, and other proprietary info) to the web.

I think this is a fairly easy fix to the existing database that creates the contracts. All we need to do is write a line of code or a few lines of code into the existing contracting database that removes all of the proprietary information and allows the user to download or print a stripped version of it. That is if the database is fillable and recognizes the proprietary information from certain fields. If it does not, then create a fillable contracting database with coded fields, then add the code that strips out those fields for the version to post on the web.

I understand all of the case law regarding per se FOIA rules; however, I don't think the rules apply in this context. By pre-disclosing a record, I don't think the disclosure technically falls under the FOIA (my opinion). If the decision is made to post unit prices but not Option Years and other optional information the contractor provided, then have the database set up where that information

is entered into certain files that are recognized as proprietary. That way the database can generate a version of the contract with the proprietary info already removed.

PUBLIC SUBMISSION

As of: July 13, 2010
Received: July 07, 2010
Status: Pending_Post
Tracking No. 80b14b49
Comments Due: July 12, 2010
Submission Type: Web

Docket: FAR-2010-0089

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Comment On: FAR-2010-0089-0001

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Document: FAR-2010-0089-DRAFT-0007

Comment on FR Doc # 2010-11381

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Government Agency Type: Federal

General Comment

See attached file(s)

Attachments

FAR-2010-0089-DRAFT-0007.1: Comment on FR Doc # 2010-11381

FAR Case 2009-004, Enhancing Contract Transparency - Advance Notice of Proposed Rulemaking

The following are comments provided by members DA ECC 413th CSB.

Comments:

- 1) FAR Parts 12, 13, and 15 would need to be amended to state that redacted contracts showing only the total value of the contract are to be posted.

Contractor proposals are not to be posted with the contract even if incorporated by reference into the contract in order to protect proprietary information. Protections must be in place for the contractor so that contractors will continue to be interested in submitting bids/proposals on Government requirements.

- 2) FAR Part 14 need only state that the contract shall be posted. Sealed bidding allows for announcement of all CLIN pricing.
- 3) A FAR clause notifying offerors of posting requirements for contract awards should also be created. The clause needs to state what kind of information will be posted. The clause should be mandatory for all RFQs and solicitations.

- 4) Suggest either IT develop new system or improve FEDBIZOPPS.

PUBLIC SUBMISSION

As of: July 13, 2010
Received: July 12, 2010
Status: Pending Post
Tracking No. 80b17b0b
Comments Due: July 12, 2010
Submission Type: Web

Docket: FAR-2010-0089

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Comment On: FAR-2010-0089-0001

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Document: FAR-2010-0089-DRAFT-0008

Comment on FR Doc # 2010-11381

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Organization: U.S. Army Contracting Command

Government Agency Type: Federal

Government Agency: USA

General Comment

To protect the rights of the contractor, the contract or solicitation might include a clause that would require the contractor/offeror to identify its proprietary information that is not to be made available to the public.

Contractor/offeror information released to the public should not jeopardize the contractor's/offeror's competitive position from a pricing or technical perspective. It is also important to protect contractor/offeror information that supports pending patents.

PUBLIC SUBMISSION

As of: July 13, 2010
Received: July 12, 2010
Status: Pending_Post
Tracking No. 80b17315
Comments Due: July 12, 2010
Submission Type: Web

Docket: FAR-2010-0089

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Comment On: FAR-2010-0089-0001

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Document: FAR-2010-0089-DRAFT-0009

Comment on FR Doc # 2010-11381

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General Comment

See attachment

Attachments

FAR-2010-0089-DRAFT-0009.1: Comment on FR Doc # 2010-11381

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STEPHEN E. SANDHERR, Chief Executive Officer
DAVID R. LUKENS, Chief Operating Officer

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



July 12, 2010

FAR Secretariat (VPR)
1800 F Street, NW
Room 4041
Attn: Hada Flowers
Washington, DC 20405

Re: FAR Case 2009-004, Enhancing Contract Transparency

On behalf of the Associated General Contractors of America (hereinafter "AGC"), thank you for the opportunity to submit the following comments on the advance notice of proposed rulemaking (hereinafter "ANPR"), that the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (hereinafter the "FAR Councils") issued May 13, 2010. In short, the Councils are seeking input on the development of modifications to the Federal Acquisition Regulation (hereinafter "FAR") to enable public posting of contract actions.

AGC is the leading association for the construction industry. Founded in 1918 at the express request of President Woodrow Wilson, AGC now represents more than 33,000 firms in nearly 100 chapters throughout the United States. Among the association's members are approximately 7,500 of the nation's leading general contractors, more than 12,500 specialty contractors, and more than 13,000 material suppliers and service providers to the construction industry. These firms engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, hospitals, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. Many of these firms regularly perform construction services for the U.S. Army Corps of Engineers, the Naval Facilities Engineering Command, the General Services Administration and other federal departments and agencies. Most are small and closely-held businesses. Unlike many associations in the industry, AGC proudly represents both union and open-shop construction contractors.

Overall Perceptions of the Proposed Rule

At the outset, AGC wishes to agree in principle with the ideas of increasing accountability and transparency in federal contracting. We agree with the goals of this ANPR and the Councils' expectation that some statutory change is forthcoming that would implement this rule, given the direction the Administration has been heading in and the contracting initiatives it has implemented. However, AGC would like to express its desire that implementation of the product of this ANPR does not become binding until such statutory authority is in place.

Furthermore, AGC would like to request that since there is presently no statutory authority for the implementation of this public posting system, that the comment periods on any products of this ANPR be subject to periods for public comment that are longer rather than shorter. It makes

little sense to have the product of this ANPR subject to a 30-day comment period where a longer one, at least 60 days, would potentially solicit better and more varied perspectives on this issue.

Comments on the Mechanics/Process of Disclosure

AGC understands that while disclosure remains the purpose of the rule, we find it difficult to identify what precisely is going to be made public that is not already publicly available. The majority of information in the contracts is either located in the solicitation at <https://www.fedbizopps.gov> or is stock contract language that is available as part of the FAR at <https://www.acquisition.gov/far> in FAR Subchapter H – Parts 52 and 53. It seems that the majority of information beyond what is in the solicitation and the FAR would be information that should be protected. If the process is to release everything, but redact the protected information, would that not lead to either redacting more than you are posting (making the disclosure a net loser based on effort input), or disclosing nothing more than what is already available (making the net additional disclosure zero and the action pointless), or both?

AGC also questions which contracts would be posted under these disclosure procedures. Would it be all contracts after enactment, or would it be retroactive to contracts entered into before enactment? If it is retroactive, how far back would the disclosure go? Would the disclosure be for contracts that are currently open and active, or would contracts only be posted once they are completed and final payment made?

What Should Be Protected Material/What is a 'Contract Action'

It is encouraging that "the Councils are considering how best to revise the FAR to facilitate such posting without violating statutory and regulatory prohibitions against disclosing protected information belonging to the Government or contractors." Unfortunately, the ANPR states that "It may not be practical to apply FOIA procedures before posting in every case."

AGC does not know how it would be possible to reconcile the numerous FAR and other statutory and regulatory protections afforded to confidential/proprietary data with any mechanism that would provide less protection than that provided by FOIA and related agency regulations and guidance.

AGC cannot discern anything in the various Memoranda cited in the ANPR that would dictate that the legitimate and laudable movement towards more transparency would suggest, even in the slightest, that there should be any less care taken in protecting confidential information. In fact, the December 9, 2009 OMB memorandum on the Open Government Initiative directly addresses this very concern:

"Nothing in this Directive shall be construed to supersede existing requirements for review and clearance of pre-decisional information by the Director of the Office of Management and Budget relating to legislative, budgetary, administrative, and regulatory materials."

We believe that the starting point for the evaluation as to which information should be publicly available should be nothing less than FOIA standards for review and redaction, at least with respect to confidential business information, for *all* disclosed contracts.

Material to be Protected

The safeguards suggested by the Councils fall short of applying FOIA procedures and as a result they all bear increased risks of disclosure of protected information. AGC believes that these protections should apply at minimum to:

- Bid Proposals and Source Selection Information - [FAR 3.104-4 and FAR 24.202(a)] – which AGC believes to include design documents, proprietary work processes of Design-Build proposals, and any other deliverables associated with a contractor's bid or proposal
- Information obtained to determine reasonableness of price [FAR 24.202(b)]
- Trade Secrets [FAR 15.506(e)(1) and DoD 5200.1-R, Appendix C]
- Privileged or confidential manufacturing processes and techniques [FAR 15.506(e)(2)]
- Commercial and financial information that is privileged or confidential [FAR 15.506(e)(3)] – including unit pricing
- Names of individuals providing past performance information [FAR 15.506(e)(4)]
- Classified information relevant to national security [DoD 5220.22-M, DoD 5220.22-R, and FAR 4.4]

DoD Regulation 5200.1-R, Appendix C, Section 2 describes the nine FOIA exemptions for information that is unclassified but considered 'for official use only' – one of which is:

Information such as trade secrets and commercial or financial information obtained from a company on a privileged or confidential basis that, if released, would result in competitive harm to the company, impair the government's ability to obtain like information in the future or to protect the government's interest in compliance with program effectiveness.

While the FAR is unclear as to the definition of trade secrets and in practice seems to have left it to the agencies to determine what this covers, the Economic Espionage Act of 1996 (18 USC 1831-39) defines trade secrets as all forms and types of financial, business, scientific, technical, economic or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

- The owner thereof has taken reasonable measures to keep such information secret, and;

- The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by the public.

It bears repeating at this point that one of the underlying statutory protective devices prohibiting the public release of confidential information imposes criminal fines and possible imprisonment, as well as termination of employment, for employees of the government who disclose confidential information. It is therefore difficult to imagine that the Councils would willingly place government employees needlessly at risk by not providing for the most rigorous screening process presently available: FOIA procedures, at least with respect to issues of confidentiality. It might be useful to quote the statutory proscription at 18 U.S.C. 1905:

Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Office of Federal Housing Enterprise Oversight, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

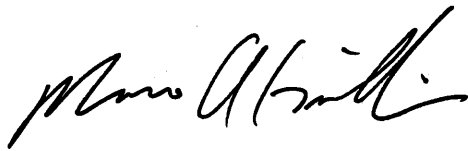
As you are aware, agencies will sometimes post their contracts on their websites. In the experience of many of our members such decisions are always preceded by a FOIA-like review and redaction process. Although such a time-consuming process may seem burdensome to the government and to industry, the consequences of not doing so would be far more than burdensome; they could result in criminal fines or penalties for government employees and extraordinarily heavy cost to the government, individuals and industry, as alluded to in the OMB memorandum, which is repeated here for the sake of emphasizing the issues that are at stake with this ANPR:

"Moreover, nothing in this Directive shall be construed to suggest that the presumption of openness precludes the legitimate protection of information whose release would threaten national security, invade personal privacy, breach confidentiality, or damage other genuinely compelling interests."

Conclusion

AGC appreciates the opportunity to submit comments on the advance notice of proposed rulemaking Councils issued May 13, 2010. AGC finds that the issues we present in our comments will avoid a great deal of confusion and complication for the Federal construction procurement process. Thank you again for considering AGC's views. The association would welcome the opportunity to provide additional information or support for the rulemaking process.

Sincerely,

A handwritten signature in black ink, appearing to read "Marco A. Giamberardino". The signature is fluid and cursive, with a prominent initial "M" and a long, sweeping underline.

Marco A. Giamberardino, MPA
Senior Director
Federal and Heavy Construction Division

PUBLIC SUBMISSION

As of: July 13, 2010
Received: July 12, 2010
Status: Pending_Post
Tracking No. 80b17c42
Comments Due: July 12, 2010
Submission Type: Web

Docket: FAR-2010-0089

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Comment On: FAR-2010-0089-0001

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Document: FAR-2010-0089-DRAFT-0010

Comment on FR Doc # 2010-11381

Submitter Information

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General Comment

Please see the attached file for comments.

Attachments

FAR-2010-0089-DRAFT-0010.1: Comment on FR Doc # 2010-11381

Department of Health and Human Services (DHHS) comments regarding FAR Case 2009-004 "Enhancing Contract Transparency."

There are several general concerns:

- 1) The posting of contracts will discourage potential offerors from submitting proposals;
- 2) This would be a duplicative administrative process since contract information is currently posted in several venues such as FedBizOpps and USASpending.gov. The submission of contract data to the Federal Procurement Data System, the posting of solicitations and award information on FedBizOpps, and the Freedom of Information Act all provide sufficient transparency while providing for the protections that should be considered in the contracting process.
- 3) Protection of proprietary information may be compromised. There is considerable risk involved in requiring the public posting of contracts. Contracts usually contain sensitive information, including proprietary data. The courts have found that unit pricing is proprietary and may not be releasable. The redaction of that data for every contract and task/delivery order will result considerable effort on the part of the GS1102 contracting workforce, which is already a strained workforce. Additionally, the Contractor effort involved in redacting information for all contracts will result in increased costs to the Government.
- 4) This requirement may generate a lot of legal wrangling over the posting of proprietary information and delay the awarding/functioning of contracts.
- 5) The administrative costs, burden, and risks just in the posting alone to both the Government and industry are significant and will be challenging. Additionally, the change management/training effort and oversight to ensure compliance with this requirement will further compound these challenges. While the workload in the posting alone will be challenging enough, the real burden and cost to the Government will come following the posting by virtue of a significant surge in public inquiries and how that will detract from the Contracting Officer's primary responsibility to award and manage contracts.
- 6) The Freedom of Information Act (FOIA) process provides a more cost effective and manageable approach for transparency and ensures expenditure of resources only when needed.

If this line of action is unavoidable, we suggest the following:

- 1) Add a module to FedBizOpps where the successful offeror can post a redacted contract (the SOW and award notice are already posted there and contractors are familiar with the site). Enforce compliance by withholding the first invoice payment until this is done.
- 2) Limit this requirement to actions over \$10 million.
- 3) Tailor the rule to include only posting the SOW/PWS and deliverable schedule but allow the Contracting Officer to not publish if the information would contain

proprietary data. The award notice would state that copies can be obtained under FOIA.

PUBLIC SUBMISSION

As of: July 13, 2010
Received: July 12, 2010
Status: Pending Post
Tracking No. 80b17e5b
Comments Due: July 12, 2010
Submission Type: Web

Docket: FAR-2010-0089

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Comment On: FAR-2010-0089-0001

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Document: FAR-2010-0089-DRAFT-0011

Comment on FR Doc # 2010-11381

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Organization: Coalition for Government Procurement

General Comment

The Coalition for Government Procurement

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July 12, 2010

General Services Administration, FAR Secretariat
(MVCB)

Attn: Hada Flowers

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Washington, DC 20405.

RE: FAR Case 2009-004, Enhancing Contract Transparency

Dear Ms. Flowers:

The Coalition for Government Procurement appreciates the opportunity to comment on the advance notice of proposed rulemaking regarding the public posting of contract actions.

The Coalition for Government Procurement is a non-profit association of over 300 firms selling commercial services and products to the federal government. Our members comprise small, medium, and large businesses actively engaged in Federal business. Our members collectively account for approximately 70% of the sales generated through the GSA Multiple Award Schedules program and about half of the commercial item sales made to the government each year.

The notice of proposed rulemaking states “the Councils anticipate that, in the future, a requirement to post online the text of contracts and task and delivery orders will be instituted.” The notice itself acknowledges the danger of posting contracts online, and the need to protect contractors’ confidential proprietary commercial or financial information, that would be available for the public and their competitors scrutinize. To protect contractors, the Coalition recommends redacting all confidential and proprietary information, as well as any item associated with national security, before posting contracts online.

As the basis for the proposed rule, the councils referenced seven administration memos and directives issued during the past 18 months calling for increased transparency from federal agencies. None of those directives, however, call for, or even suggest, the posting of government contracts online. Moreover, the rule may be unnecessary and redundant, as the public can acquire copies of individual agency contracts through Freedom of Information Act requests, and USASpending.gov provides information about government awards.

The proposal states the transparency effort is intended “to promote efficiency in Government contracting through an open acquisition process and to improve Federal spending accountability.” The Coalition however, does not believe there is a direct correlation between posting contracts online and improving efficiency and spending. In addition, we are concerned the rule would add work to an already overburdened acquisition workforce. Of particular concern is the logistics of going through every contract line by line searching for proprietary and private information, such as pricing and salaries that must be redacted. With more than 30 million transactions issued by the government annually, the redaction process alone would be overwhelming.

Another area of concern is the posting of procurement information that may have national security implications. While spending directly related to intelligence and military operations may be easily identified, the Coalition is concerned that other spending that supports these, or similar, operations may be posted at the detriment to critical security interests. Certain commercial IT procurements, for example, could provide information on what the government is – and is not – doing on such matters as cyber-security or information sharing, to name just two activities. We believe that caution should be exercised in this area. Many procurements that may seem unrelated to national security may be. As such, we believe that more than just acquisition professionals must be involved in any transparency movement, lest we inadvertently supply sensitive information to the manifest entities that mean to do us harm. It is important to note that transparency means that anyone can see our information.

Thank you again for the opportunity to comment. Please let us know if you have any questions or would like to discuss these issues further.

Regards,

Mitchell T. Vakiercs
Manager of Policy
The Coalition for Government Procurement
1990 M Street, NW, Suite 450
Washington, DC 20036
202.315.1054

Attachments

FAR-2010-0089-DRAFT-0011.1: Comment on FR Doc # 2010-11381

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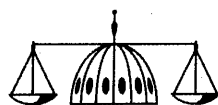
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**The Coalition
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Procurement**

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www.thecgp.org

July 12, 2010

General Services Administration, FAR Secretariat
(MVCB)
Attn: Hada Flowers
1800 F Street, NW., Room 4041,
Washington, DC 20405.

RE: FAR Case 2009-004, Enhancing Contract Transparency

Dear Ms. Flowers:

The Coalition for Government Procurement appreciates the opportunity to comment on the advance notice of proposed rulemaking regarding the public posting of contract actions.

The Coalition for Government Procurement is a non-profit association of over 300 firms selling commercial services and products to the federal government. Our members comprise small, medium, and large businesses actively engaged in Federal business. Our members collectively account for approximately 70% of the sales generated through the GSA Multiple Award Schedules program and about half of the commercial item sales made to the government each year.

The notice of proposed rulemaking states "the Councils anticipate that, in the future, a requirement to post online the text of contracts and task and delivery orders will be instituted." The notice itself acknowledges the danger of posting contracts online, and the need to protect contractors' confidential proprietary commercial or financial information, that would be available for the public and their competitors scrutinize. To protect contractors, the Coalition recommends redacting all confidential and proprietary information, as well as any item associated with national security, before posting contracts online.

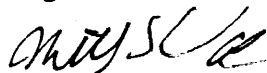
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Thank you again for the opportunity to comment. Please let us know if you have any questions or would like to discuss these issues further.

Regards,



Mitchell T. Vakiercs
Manager of Policy

2009-004-12

Page 1 of 1

PUBLIC SUBMISSION

As of: July 13, 2010
Received: July 12, 2010
Status: Pending_Post
Tracking No. 80b17ef7
Comments Due: July 12, 2010
Submission Type: Web

Docket: FAR-2010-0089

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Comment On: FAR-2010-0089-0001

Federal Acquisition Regulation: FAR Case 2009-004, Enhancing Contract Transparency

Document: FAR-2010-0089-DRAFT-0012

Comment on FR Doc # 2010-11381

Submitter Information

Name: Scott H. Amey

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Phone: 202-347-1122

Fax: 202-347-1116

Organization: POGO

General Comment

Please find POGO's comment to FAR Case 2009-004—Enhancing Contract Transparency attached.

Attachments

FAR-2010-0089-DRAFT-0012.1: Comment on FR Doc # 2010-11381

Exposing Corruption Exploring Solutions

Project On Government Oversight

July 12, 2010

Ms. Hada Flowers
General Services Administration
Regulatory Secretariat (MVCB)
1800 F Street, NW, Room 4041
Washington, DC 20405

Re: FAR Case 2009-004—Enhancing Contract Transparency

Dear Ms. Flowers:

The Project On Government Oversight (POGO) is an independent nonprofit that investigates and exposes corruption and other misconduct in order to achieve a more effective, accountable, open, and ethical federal government. As such, POGO is interested in enhancing transparency in the area of federal contract spending.

In this vein, POGO strongly supports the intent of the advanced notice of proposed rulemaking under FAR case 2009-004, Enhancing Contract Transparency (75 Fed. Reg. 26916, May 13, 2010). This case will amend the FAR to enable the online posting of contracts and task and delivery orders. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are “seeking information that will assist in determining how best to amend the Federal Acquisition Regulation (FAR) to enable public posting of contract actions, should such posting become a requirement in the future, without compromising contractors’ proprietary and confidential commercial or financial information.” Specifically, the Councils request how to best protect contractor proprietary and confidential commercial or financial information. Although POGO agrees with the intent of the rulemaking, the Councils should reconsider the focus of the rule and shift it toward disclosure of information rather than concealment of information. In order to regain public faith in the contracting system, the government must provide open public access to information on the contracting process, including actual copies of contracts rather than coded summary data, and contracting officers’ decisions and justifications.

POGO finds it highly unlikely that contractors will stop competing for federal awards if contract information is disclosed. Some states have already adopted a move toward a more transparent contracting system. For example, the Commonwealth of Virginia allows public access to procurement transactions, (Code of Virginia § 2.2-4342). The public is permitted to see cost estimates and competitive bids and offers. The exclusion of trade

secrets or proprietary information is only permitted when “the bidder, offeror or contractor shall (i) invoke the protections of this section prior to or upon submission of the data or other materials, (ii) identify the data or other materials to be protected, and (iii) state the reasons why protection is necessary,” (Code of Virginia § 2.2-4342(f)).

When contract information is publicly accessible, genuine competition will increase and the government will be better situated to receive discounts and rebates that will benefit the government and taxpayers—especially as budget constraints take hold. Simply stated, the government will be in a much improved position to leverage its robust buying power.

The best way to introduce this transparency in contracting is for USAspending.gov to become the one-stop shop for government officials and the public for federal contract spending information. This includes actual copies of each contract, task and delivery order, modification, amendment, other transaction agreement, grant, and lease, including price and cost information. Additionally, proposals, solicitations, award decisions and justifications (including all documents related to contracts awarded with less than full and open competition and single bid contract awards), audits, performance and responsibility data, and other related government reports should be incorporated in USAspending.gov.

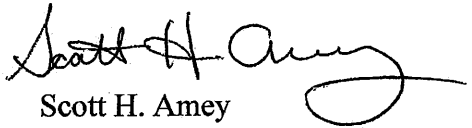
In order to store and provide access to this information, the government must shift to a government-wide integrated electronic system that would create and store pre- and post-award contracting records. That system should permit automatic redactions of only the most protected information or data fields, including classified information and other information that would potentially cause substantial harm to a contractor, but only when those exceptions are not outweighed by the public benefit that would be realized by the disclosure of such information. Additionally, as described in the Virginia example above, the burden should be placed on the prospective contractors and awardees to justify withholding information from public view.

The notice inquired about whether a public meeting on this subject would be beneficial. Holding a public meeting on the methods by which contracts will be made public and the types of information that should be publicly accessible would allow various stakeholders, including the public, to share different viewpoints on the topic. If such a meeting is held, POGO would like to be a presenter.

In his memorandum on Transparency and Open Government, President Obama asks agencies to “disclose information rapidly in forms that the public can readily find and use” through the use of innovative technologies and systems. Additionally, the Administration’s emphasis on disclosure under FOIA and its Open Government Directive are efforts to place government information in the hands of the public. POGO believes that the concepts contained in those initiatives should be incorporated into the FAR, including Subparts 5.4 (“Release of Information”) and 24.2 (“Freedom of Information Act”), so that an emphasis on user-friendly tools and transparency are embedded throughout the contracting community.

In summary, POGO supports this initial effort to enhance disclosure of federal contracts and related records and information. Amending the FAR to disclose government contracts and task and delivery orders, and posting related documents on USAspending.gov will greatly improve transparency and accountability in federal government contract spending.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott H. Amey", with a large, stylized flourish at the end.

Scott H. Amey
General Counsel

2009-004-13

TechAmerica

WHERE THE FUTURE BEGINS

THE ASSOCIATION OF COMPANIES DRIVING INNOVATION WORLDWIDE

Via Email

July 12, 2010

General Services Administration

Attn: Ms. Hada Flowers

FAR Secretariat (MVCB)

1800 F Street, NW

Room 4041

Washington, DC 20405

RE: FAR Case 2009-004 – Enhancing Contract Transparency

Dear Ms. Flowers:

TechAmerica¹ is pleased to submit these comments in response to the advanced notice of proposed rulemaking (ANPR) dated May 13, 2010 (75 FR 26916; the "ANPR") issued by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) in Federal Acquisition Regulation (FAR) Case 2009-004 and titled "Enhancing Contract Transparency."

I. Background

In FAR Case 2009-004, the Councils are anticipating a future need to publish electronically all Federal government contracting actions, including contracts and task orders, to a public website because of the initiatives of the Presidential Memorandums on *Freedom of Information Act* and *Transparency and Open Government*, the Attorney General Memorandum titled *Freedom of Information Act* and the Office of Science and Technology Policy Notice, titled *Transparency and Open Government*. We would commend the Councils for seeking information

¹The Technology Association of America is the leading voice for the U.S. technology industry, the driving force behind productivity growth and jobs creation in the United States and the foundation of the global innovation economy. Representing approximately 1,200 member companies of all sizes serving clients in the public and commercial sectors of the economy, it is the industry's largest advocacy organization and is dedicated to helping members' top and bottom lines. It is also the technology industry's only grassroots-to-global advocacy network, with offices in state capitals around the United States (Washington, D.C.), Europe (Brussels), and Asia (Beijing). The Technology Association of America was formed by the merger of AeA (formerly the American Electronics Association), the Cyber Security Industry Alliance (CSIA), the Information Technology Association of America (ITAA) and the Government Electronics & Information Association (GEIA). Learn more at www.aeanet.org or www.TechAmerica.org.

regarding the ramifications of amending the FAR to require public, online posting of contract actions and for asking what, if any, benefits may exist in such a transparency effort. TechAmerica believes that we must address the central question, "What is the data to be used for and does posting it online to a public website further that goal?" We concur with the stated goals of the Council that the answer should be to improve the efficacy of the acquisition process for the Federal government and the contractor community that serves the government's missions and to help achieve best value for the taxpayer. Publishing contracting documents and actions online just for the sake of disclosure does not achieve either of these laudable goals and therefore, has no place in any proposal the Councils may consider. Any proposed rule should be crafted to make protection of the interests of the Federal government and its' contracting and vendor supplier base primary to any effort to publicize contracting documentation and actions on a website.

II. Current Protections Must Remain in Force

TechAmerica does not oppose public disclosure of contractor information or information about the acquisition process, as long as existing protections regarding such information remain in force and are used. These protections include those found in the Freedom of Information Act, the Trade Secrets Act, common law decisions regarding protection of sensitive information, privileges that would attach as part our judicial processes, and protections now afforded to proprietary, trade secret, and source selection information. If these safeguards remain intact as we develop rules for the public disclosure aspect of transparency for contracting data, we believe that our concerns can be addressed. If such protections were to be waived, however, we believe that the Government would be harmed significantly.

TechAmerica would also note that there is a significant body of unclassified Federal government information that should also be considered for protection and would point to the recent Defense Acquisition Regulations Council ANPR on Safeguarding Unclassified Information (DFAR Case 2008-D028) as one initiative that acknowledges that need. The DFAR ANPR proposes to establish mechanisms for the protection of programmatic data that would transit or reside on a contractor's corporate information network, and while focused on protection from unwanted cyber intrusion, it clearly establishes that there is contracting and programmatic information outside of the NISPOM and other statutory protections that should not be disclosed. The Councils should acknowledge that body of information and reconcile this effort at transparency with that effort to protect unclassified information from public disclosure.

III. Protecting Contractor Information to Preserve Competition and Access to Innovation

The prime fear in the minds of the contracting community about publication of contracting action documents is that information regarding the products or services companies may offer and how companies bring those products and services to market will be disclosed and that publication will cause them irreparable harm. TechAmerica would be opposed to any transparency initiatives that would include unrestricted public disclosure of proprietary or sensitive contracting data because we do not believe it meets the goals stated in this ANPR – to meaningfully improve the acquisition process and inform the contracting workforce. Instead, such a proposal would risk a number of unintended and harmful consequences, including the disclosure of source selection, intellectual property or proprietary data to global competitors and adversaries.

The negative impact on the acquisition process includes a reduction in competition for government requirements, particularly for small businesses. Many companies offering commercial or commercial-off-the-shelf (COTS) items that the government has so ubiquitously adopted would be unable or unwilling to accept such risks and we believe many would choose either not to bring their innovations to the public sector in the first place or to leave the market for fear of disclosure of proprietary information. Such a reduction in competition would reduce and limit government access to commercial market innovation that it currently enjoys.

It is therefore alarming to TechAmerica that the Councils contend that “[i]t may not be practical to apply FOIA procedures before posting in every case.” Such procedures are statutorily required before each and every disclosure and cannot, as this statement in the ANPR would seem to imply, be overlooked for the sake of expediency. The Councils further state that they are “looking into methods for identifying the types of information that should not be posted or released to the public...” Unfortunately, much of the information that would be identified in any such method is prescribed by statute and can only be discerned on a contract-by-contract basis. Each offeror will have different proprietary and protected information in each response to a request for proposal that only they can identify for redaction and no one size fits all approach or method is discernable to industry. While creating a significant burden on both the government and the awardee, a model the Councils should examine is the public posting of the contract awarded by the General Services Administration for development of the *Recovery.gov* website.

IV. Protecting the Interests of the Government

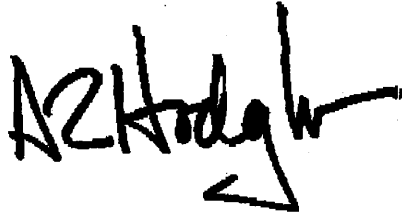
The FAR Councils should also temper any proposals to publicly disclose contracting documents with the need to protect the interests of our Nation. Those interests would be harmed significantly if disclosure included posting to a public website the unredacted contract or those components of the contracting award whereby a number of critical elements would be exposed. As an example, something as simple as identifying the location where work is to be performed could reveal the

geographic location of crucial components of our National and Homeland Security apparatuses, thereby exposing them to attack, disruption or destruction. Similarly, if data about program capabilities were to be disclosed online as part of the public disclosure of contracting actions, adversaries could evaluate the supply chain, identify critical production components and, by attacking that component, disrupt our security. Moreover, data aggregated from published contracting actions would also allow adversaries to discern and reverse-engineer our capabilities and identify our weaknesses.

Additional harm would come from the disclosure of data from a contracting action - particularly the publication of an unredacted contract - that would expose intellectual property and corporate sensitive and technical data to industrial espionage. Such exposure would allow corporate competitors to aggregate data, such as pricing methods, and weaken the competitive posture of a company in the government and commercial markets and therefore cause harm to the industrial base and our economy.

TechAmerica appreciate the opportunity to share with you our perspective on this ANPR on Enhancing Contract Transparency and would be happy to answer questions that you may have.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A.R. Hodgkins" with a stylized flourish at the end.

A.R. "Trey" Hodgkins, III
Vice President for National Security & Procurement Policy

JUL-12-2010 18:43

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2009-004-14

JENNER & BLOCK

July 12, 2010

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Ms. Hada Flowers
General Services Administration
FAR Secretariat (MVCB)
1800 F Street, NW, Room 4041
Washington, DC 20405

David A. Churchill
Tel 202 639-6056
Fax 202 637-6370
dchurchill@jenner.com

Re: FAR Case 2009-004, Enhancing Contract Transparency

Dear Ms. Flowers:

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have requested comments in determining how best to amend the Federal Acquisition Regulation (FAR) to enable public posting of contract actions without compromising contractors' proprietary and confidential commercial or financial information, should such posting become a requirement in the future. This firm represents a number of defense and aerospace companies that will be affected by a requirement of public posting of contracts.

We strongly oppose any regulation requiring public posting of contracts and foresee a great deal of additional expense imposed on both contractors and the government if such a regulation were imposed. Our clients naturally want to protect their confidential commercial and financial information due to the competitive harm that would result if such information were released. Currently, this information can be at risk of disclosure upon a FOIA request for a contract. Under FOIA, our clients are permitted to object to the disclosure of trade secrets and confidential commercial or financial information under FOIA Exemption 4, 5 U.S.C. § 552(b)(4) (Exemption 4). Exemption 4 is coextensive with the Trade Secrets Act, which prohibits federal government employees from disclosing confidential information. 18 U.S.C. § 1905; see *Canadian Commer. Corp. v. Dep't of Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008).

When faced with a FOIA request for a contract that contains confidential commercial and financial information, contractors must invest a great deal of time and expense to protect this information from public disclosure. They must first object to the government agency that received the FOIA request, provided they have been notified of its impending disclosure. They must then provide a redacted copy of the contract and a detailed explanation of the competitive harm that will result if the information is released. It is not uncommon for that agency upon receiving the contractor's objection to request additional and highly specific information to justify the reasons for withholding the confidential information. The response to such requests can be long and involved, and often entail declarations of company employees as to the competitive nature of the business and about the specific harm that could flow from release. Even when that information is provided, the agency may fail to be persuaded. A contractor must

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JENNER & BLOCK

then seek redress in the courts, in a "reverse FOIA" action to block release of the disputed information. These disputes and the initial efforts taken by contractors to protect their confidential information are enormously costly and time consuming. In one recent case, it took nine years to resolve that GE had appropriately defended from disclosure unit pricing information that it argued would cause it competitive harm if released to the public. See *General Electric Co. v. Dep't of the Air Force*, 648 F.Supp.2d 95 (D.D.C. 2009).

If contractors are required to go through a similar process for every awarded contract due to a requirement for public posting, they will be exposed to significant costs and burdens. The review and defense of confidential information contained within each contract will be a major undertaking -- if it is the same as that required by FOIA now. Each contract is different, and the circumstances surrounding the defense of the confidential information change with each contract award. We strongly believe that it would be impractical to apply FOIA procedures before posting in every case due to the burdens imposed on contractors. We have outlined below the current state of the law on whether certain kinds of information may be released under FOIA, as well as categories of information that have been withheld due to the competitive harm that may result if publicly disclosed. We then propose some alternatives to FOIA procedures should the public posting of government contracts become a requirement in the future.

Due to the potential costs to our clients if required to publicly post government contracts, we are in favor of a public meeting to address the most efficient means to accomplish this goal. Our main concern, as stated in the OMB memorandum entitled Open Government,¹ is that "nothing in this Directive shall be construed to suggest that the presumption of openness precludes the legitimate protection of information whose release would threaten national security, invade personal privacy, breach confidentiality, or damage other genuinely compelling interests."

Determining Whether Information Should Be Withheld From Public Disclosure Under FOIA and the Trade Secrets Act

The United States Court of Appeals for the D.C. Circuit has set out a multi-part test for determining whether information is "confidential." The agency (or, later, the court) must first determine whether the information in issue was submitted to the government voluntarily. See *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303, 304 (D.C. Cir. 1999) (*NASA*). If so, the agency must determine whether the submitted information is "the kind of information 'that would customarily not be released to the public by the person from whom it was obtained.'" *Id.* (quoting *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (*en banc*)). If so, the information is "confidential" and thus precluded from disclosure by FOIA Exemption 4 and the Trade Secrets Act. *Critical Mass*, 975 F.2d at 880.

If the submission of the information was compelled, however, the agency must determine whether disclosure "would be likely either (1) to impair the government's ability to obtain

¹ OMB memorandum entitled Open Government, Directive (M-10-06, December 8, 2009).

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necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *NASA*, 180 F.3d at 305 (citing *Critical Mass*, 975 F.2d at 878-80; *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) ("*National Parks I*"). If the submitter can show either impairment or substantial competitive harm, then the information is "confidential" and therefore precluded from disclosure by FOIA Exemption 4 and the Trade Secrets Act. *National Parks I*, 498 F.2d at 770-71. *General Electric Co.*, *supra*.

Categories of Confidential Information That Have Been Protected From Public Disclosure

Under these tests, our clients have successfully protected from disclosure the following types of information:

- line-item prices
- unit pricing information
- Not-to-exceed or NTE prices
- other cost and pricing information
- technical approaches or information supporting technical approaches
- schedule and performance-based payment information

These types of information are routinely marked as "proprietary" by our clients and have been protected from disclosure by law. This list is by no means exclusive, but is instead a representation of the types of information that our clients often seek to protect.

Company Steps Taken To Protect Information From Being Released to The Public

Our clients have strict policies that govern the protection of sensitive company information. These policies instruct employees on how to place appropriate legends on company proprietary information contained in various media; require that disclosure within the company be restricted to those who need to know such information; restrict release to third parties except under an agreement that provides appropriate protection for such information; require that proprietary information be stored in a locked desk, office, or cabinet; and generally control the use, storage, transmission, and disposal of such information. With respect to proprietary data concerning a contract and modifications, distribution of both hard copies and electronic copies can be limited to the finance and business operations organization.

The Competitive Harm Analysis

Although the categories listed above may seem broad, this type of confidential information is protected due to the competitive harm that may result if such information is released to the public. This is true even in cases where the contractor is the "sole source" -- or the only company that can supply the goods or services under contract. *General Electric Company v. Dep't of the Air Force*, 648 F.Supp.2d 95, 103 (D.D.C. 2009) (*GE*). Importantly, to

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Ms. Hada Flowers
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Page 4

JENNER & BLOCK

protect such information under Exemption 4 and the Trade Secrets Act, a contractor need not "provide evidence of actual competition over *the particular contracts* requested." *Id.* Instead, a contractor need only put forward evidence that it has actual competition and that disclosure is likely to cause it substantial competitive harm *in the future*. See, e.g., *Gulf & Western*, 615 F.2d 527, 530 (D.C. Cir. 1979). This means that if the information requested to be released would allow competitors to underbid the contractor in the future, such information should be withheld from the public. Furthermore, The D.C. Circuit has expressly found that customer leverage – or the ability of the "company's commercial customers to negotiate more effectively and thereby 'ratchet down' prices" – has the potential to be substantially competitively harmful and provides a basis for nondisclosure. *NASA*, 180 F.3d at 305. Finally, a contractor need not show that its other customers enjoy the same bargaining position as the government agency that is a party to the contract information at issue in order for the disputed information to be withheld. *GE*, 648 F.Supp 2d at 104-05.

Proposed Alternatives

Given that defending one's confidential information in a FOIA request can be costly and time-consuming, we propose two alternatives that may effectively diminish the level of effort required. The first is to state plainly in the government solicitation that every page not marked as proprietary will be posted on the web. This will give contractors notice that they must determine at the outset of award which pages of the contract contain confidential information. A second alternative would be to ask the contractor, at the time of the award, to submit a redacted copy of the contract for public posting. Central to this alternative would be the recognition that the contractor need not submit a detailed justification for its redactions, but merely a declaration that the contractor has, in good faith, provided a redacted copy according to the current FOIA law.

Government Accountability

Finally, it is worth noting that the Government may also be at risk if alternatives to the FOIA Exemption 4 analysis are not adopted for purposes of public posting. Because Exemption 4 is co-extensive with the Trade Secrets Act, government personnel are prohibited from releasing contractor trade secrets, and may be personally liable if that information is released. The responsible government agency employee would thus be at risk if required to publicly post a contract without express contractor authorization.

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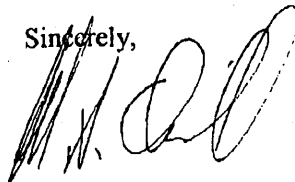
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JENNER & BLOCK***Conclusion***

We appreciate consideration of these comments. Again, we believe that a public meeting addressing these concerns would be beneficial. If you have questions or need additional information, please do not hesitate to contact me.

Sincerely,



David A. Churchill